

STATE OF MICHIGAN
COURT OF APPEALS

DAVID ASHEN,

Plaintiff/Counter-Defendant-
Appellant,

v

SCOTT ASSINK and STACY ASSINK,

Defendants/Counter-Plaintiffs-
Appellees.

UNPUBLISHED
April 20, 2017

No. 331811
Van Buren Circuit Court
LC No. 14-640678-CZ

Before: STEPHENS, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

David Ashen, in pro per, appeals as of right the trial court order dismissing his complaint to quiet title over real property and granting defendants, Scott and Stacy Assink, summary disposition under MCR 2.116(C)(10) thereby, quieting title to the real property in their names. We affirm.

I. BACKGROUND

This case concerns the real property located at 246 Webster Avenue, South Haven, Michigan 49090. For over a decade, plaintiff and his siblings litigated ownership of the property. In 1989, the Van Buren Circuit Court confirmed the sale of the property to plaintiff's sister, Michelle Ashen, who purchased the ownership interests of her siblings, including any interest belonging to plaintiff. Only Michelle paid taxes on the property from 1989 forward. However, she never physically occupied the property. Plaintiff's brother, Joseph Ashen, owned 260 Webster Avenue, the property adjoining 246 Webster Avenue, and was granted an appurtenant easement over 246 Webster Avenue in 1999 for accessing underground utility lines. While the parties dispute the nature and extent of plaintiff's presence on the subject property, they agree that he fenced the property and utilized the land, at the least, for storage of items including inoperative vehicles. In fact, the local government cited Michelle for numerous code violations related to the storage of such items and the use of the property for purposes in violation of local ordinances. Michelle, who lived in California, periodically corresponded with plaintiff in this regard and pertaining to her on-going efforts to sell the property. On April 28, 2011, plaintiff filed a Claim of Lien against the 246 Webster Avenue property pursuant to the Construction Lien Act, MCL 570.1101 *et seq.* The claim alleged that plaintiff provided labor or

material for an improvement to the property owned by Michelle Ashen at 246 Webster Avenue beginning May 18, 1985, and ending April 2, 2011, for a contracted amount of \$27,100. Plaintiff filed a second Claim of Lien on September 19, 2011. That claim alleged that beginning July 17, 2007, plaintiff maintained the property, buildings and landscaping at 246 Webster Avenue owned by Michelle Ashen and that Michelle owed plaintiff \$24,900 for plaintiff's services. Both liens expired without further action.

On September 10, 2013, defendants purchased the property from Michelle by Trustee's Deed. Defendants noticed a small amount of miscellaneous junk items on the property at the time of purchase, but assumed it belonged to Joseph because the majority of it was on his property. Defendants claimed that they did not learn that the junk belonged to plaintiff until after closing. On August 25, 2014, defendants filed a Complaint to Recover Possession of Property against plaintiff. Plaintiff filed an in pro per complaint on October 28, 2014, asking the court to quiet title to the real property in his name based on a theory of adverse possession. An amended complaint was filed with the assistance of counsel on November 3, 2014, alleging the same. Defendants filed a three-count counterclaim that requested the court quiet title to the real property in their names, issue a permanent injunction against plaintiff and find that plaintiff trespassed on their land.

The circuit court case was initially assigned to Judge Jeffrey J. Dufon who issued a Civil Proceedings Scheduling Order on December 5, 2014. On April 14, 2015, plaintiff's case was reassigned to Judge David J. Distefano who amended the scheduling order based on the parties' agreement that case evaluation was inappropriate. On August 7, 2015, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (10) against plaintiff. Defendants argued that they were entitled to summary judgment pursuant to MCR 2.116(C)(7) under a theory of res judicata because plaintiff's ownership of the property was previously litigated in a prior court action that determined Michelle held full title to the property. Defendants argued that they were also entitled to summary disposition under MCR 2.116(C)(10) because no genuine issue of material fact existed as to whether plaintiff could prove all the elements of his adverse possession claim. Plaintiff defended that he had a right of title to the property under an adverse possession theory where his exclusive possession of the property began on September 25, 1989.

After a hearing, the trial court issued its opinion and order granting defendants' motion for summary disposition under MCR 2.116(C)(10). The trial court determined that plaintiff's use of the property while Michelle owned it "was permissive and not under a claim of right" based on Michelle's affidavit and plaintiff's own construction liens on the property. The trial court also granted relief to defendants on all three counts of their counterclaim, quieting title to the real property in their names, holding that plaintiff's entry onto the land constituted trespass, ordering that plaintiff was permanently enjoined from entering the property, and that plaintiff had 30 days to remove his personal property from the land.

II. JUDICIAL DISQUALIFICATION

A. STANDARD OF REVIEW

To preserve a judicial disqualification issue the moving party must first raise the issue by motion before the challenged judge and if denied, "refer the motion to the chief judge, who shall

decide the motion de novo.” MCR 2.003(B) and (D)(3)(a)(i). The issue of judicial disqualification was not preserved because plaintiff did not file a motion for disqualification in the trial court before Judge Distefano.

We review for plain error affecting substantial rights an unpreserved judicial disqualification issue. *People v Carines*, 460 Mich 750, 763-764, 597 N.W.2d 130 (1999). “To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Id.* at 763.

B. ANALYSIS

MCR 2.003(C) provides the grounds for which a judge may be disqualified. Plaintiff appears to argue MCR 2.003(C)(1)(a), (b)(ii), (c) and (e). Under MCR 2.003(C)(1)(a), plaintiff argues that Judge Distefano was biased because he “sided with the defense” and “gave defendants everything they wanted.” “The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment. *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). Plaintiff cites the language of MCR 2.003(b)(ii) in support of disqualification but provides no explanation of its application to this case. “An appellant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue.” *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). Plaintiff argues that Judge Distefano should have been disqualified under MCR 2.003(C)(1)(c) because, as a mediator over the case he would have had “personal knowledge of disputed evidentiary facts concerning the proceeding.” The record however demonstrates that the mediation scheduled for June 11, 2015 was cancelled on June 2, 2011, therefore Judge Distefano never actually mediated the case and plaintiff fails to show what personal knowledge, if any, Judge Distefano had “of disputed evidentiary facts concerning the proceeding.” MCR 2.003(C)(1)(c). Plaintiff lastly argues that Judge Distefano should have been disqualified under MCR 2.003(C)(1)(e), which provides, “[t]he judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.” Plaintiff asserts that before Judge Distefano was appointed to the bench, he was a partner with an attorney named Adam Bancroft in a Bangor City law firm. While partnership with an attorney of a party is a basis for disqualification under MCR 2.003(C)(1)(e), the fact that the judge was a former partner with any attorney is not a basis for disqualification.

III. AMENDMENT OF THE SCHEDULING ORDER

A. STANDARD OF REVIEW

“The interpretation and application of court rules is a question of law to which the rules of statutory interpretation apply and is reviewed de novo on appeal.” *Natl Waterworks, Inc v Intl Fid & Sur, Ltd*, 275 Mich App 256, 258; 739 NW2d 121 (2007).

We review for an abuse of discretion the trial court’s decision to reassign a case. *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005).

The abuse of discretion standard recognizes that there may be no single correct outcome in certain situations; instead, there may be more than one reasonable and

principled outcome. When the trial court selects one of these principled outcomes, it has not abused its discretion and so the reviewing court should defer to the trial court's judgment. An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. [*Id.*].

Unpreserved claims of due process are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 764–765. To establish plain error, plaintiff must show “(1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected defendant's substantial rights.” *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011). The third factor requires plaintiff to show that the error affected the outcome of the proceedings. *Carines*, 460 Mich. at 763.

B. ANALYSIS

Plaintiff appears to present three arguments in regards to the trial court's amended scheduling order: 1) Judge Distefano was not properly assigned to appellant's case such that he was not in a position to properly amend the order; 2) Judge Distefano lacked authority to amend Judge Dufon's scheduling order; and 3) appellant did not receive notice of the May 11, 2015 status conference that resulted in the scheduling order being amended.

Plaintiff is correct that the reassignment of cases is a responsibility of the chief judge and is accomplished with an order. MCR 8.111(C). However, even if this Court were to adjudge the reassignment improper, plaintiff fails to show plain error because he suffered no prejudice from the reassignment. Plaintiff “is required to show prejudice as a result of the improper assignment.” *Natl Waterworks, Inc v Intl Fid & Sur, Ltd*, 275 Mich App 256, 261; 739 NW2d 121 (2007). Prejudice is established by showing that “the reassignment of the case in the lower court was motivated by impermissible considerations or that the lower court judge was biased or partial.” *Kloian v Schwartz*, 272 Mich App 232, 243; 725 NW2d 671 (2006). Plaintiff does not argue that the trial court was motivated by impermissible considerations and we decided above that plaintiff failed to establish that Judge Distefano was biased.

Plaintiff presents no authority for the assertion that Judge Distefano, after he was assigned plaintiff's case, could not amend Judge Dufon's scheduling order. Under MCR 2.401(B)(2) a trial court “shall establish times for events the court deems appropriate, including ... (ii) the amendment of pleadings, adding of parties, or filing of motions....” The purpose of a scheduling order is to “facilitate the progress of the case.” MCR 2.401(B)(2)(a). The court rules also provide that “[m]ore than one such order may be entered in a case.” MCR 2.401(B)(2)(a). In this case, Judge Dufon's December 5, 2014 Civil Proceedings Scheduling Order provided that “[t]he parties may request a status conference and schedule a hearing with the assignment clerk to consider modifications to this order.” Defendants requested the May 11, 2015 status conference. It was within the court's discretion to entertain any requests for modification of the original scheduling order at that conference. MCR 2.401(B)(2); *Kemerko Clawson LLC*, 269 Mich App at 349. Plaintiff's claim for adverse possession was an equitable claim. The removal of equitable claims from case evaluation was authorized by MCR 2.403(A)(3) which grants the trial court the authority to “exempt claims seeking equitable relief from case evaluation . . . by stipulation of the parties if the court finds that case evaluation of such claims would be inappropriate.” The parties stipulated to remove the claim from case evaluation at that

conference. Therefore, the amendment of the scheduling order to cancel case evaluation was not an abuse of discretion in this case where the parties agreed to remove plaintiff's claim from case evaluation and the trial court found that case evaluation would be inappropriate.

Plaintiff last argues that his due process rights were violated when his attorney and the court colluded to “den[y] [him] knowledge of the ADR hearing June 11th 2015 the May 11th 2015 Settlement Conference, [and] the Motion for Summary Disposition” hearing until the night before the hearing. The state and federal constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const, Am XIV; Const 1963, art 1, § 17. “[P]rocedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner.” *Mettler Walloon, LLC v Melrose Tp*, 281 Mich App 184, 213-214; 761 NW2d 293 (2008). Plaintiff's due process claim fails because plaintiff cannot argue a due process violation against his attorney. Procedural due process claims are the deprivation of a constitutionally protected interest by *state action*. *Bonner v City of Brighton*, 298 Mich App 693, 708; 828 NW2d 408 (2012) (emphasis added), rev'd on other grounds 495 Mich 209; 848 NW2d 380 (2014). Further, plaintiff was not entitled to be present at the May 11 status conference. MCR 2.401(A) states that “[a]t any time after the commencement of the action, on its own initiative or the request of a party, the court may direct that the attorneys for the parties, alone or with the parties, appear for a conference . . .” Because the court rule grants the trial court with authority to summon just the attorneys to appear for a conference, plaintiff was not entitled to an opportunity to be heard at the status conference.

IV. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

The court stated that it was deciding defendants' motion for summary disposition under MCR 2.116(C)(10) only. We review de novo the trial court's decision to grant or deny a motion for summary disposition. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999)].

“A claim for adverse possession is equitable in nature. And decisions regarding equitable claims, defenses, doctrines, and issues are reviewed de novo.” *Beach*, 283 Mich App at 508; (citation omitted).

Unpreserved claims of due process are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 764–765. To establish plain error, appellant must show “(1) that an

error occurred, (2) that the error was plain, and (3) that the plain error affected defendant's substantial rights.” *Kowalski*, 489 Mich at 505.

B. ANALYSIS

“A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years.” *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993); MCL 500.5801(4). “The 15-year period begins when the rightful owner has been disseised of the land.” *Canjar v Cole*, 283 Mich App 723, 731; 770 NW2d 449 (2009) citing MCL 600.5829. “Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership. If the true property owner regains possession of the land and loses it again, a new cause of action accrues.” *Kipka*, 198 Mich App at 439-440 (citations omitted). The use of the property during the statutory period must be ‘hostile,’ meaning, “inconsistent with the right of the owner, without permission asked or given, and which use would entitle the owner to a cause of action against the intruder.” *Wengel v Wengel*, 270 Mich App 86, 92–93; 714 NW2d 371 (2006) (quotation marks and citation omitted). It also must be under color of right. “Determination of what acts or uses are sufficient to constitute adverse possession depends upon the facts in each case and to a large extent upon the character of the premises.” *Burns v Foster*, 348 Mich 8, 14; 81 NW2d 386 (1957). “It is elementary that the burden of proving adverse possession rests upon the party who alleges it; strict construction of the doctrine is applied, and such possession must rest upon clear and positive proof, not inference.” *Id.* “[T]here is a presumption that land is possessed by the owner of record unless it is shown to be otherwise[.]” *Kipka*, 198 Mich App at 440 citing MCL 600.5867.

Upon review of the evidence submitted by both parties at the time of the motion for summary disposition, *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 128; 782 NW2d 800 (2010), we conclude that plaintiff failed to prove that his use of the property was hostile to Michelle’s ownership.

Plaintiff argues that the 15-year statutory period for his claim of adverse possession began on September 25, 1989, which is the date Michelle Ashen received legal title to the real property at 246 Webster by court order. Based upon that date, the 15-year statutory period would have culminated in 2004. Plaintiff argued his hostile use and occupation of the property was demonstrated by his exclusive maintenance of the property, building structures upon it, engaging in recreational activities, and storing personal items there. He presented affidavits of numerous witnesses to support his claim that he stored personal items on the property, maintained the property, and constructed a fence and patio there. His personal affidavit stated that Michelle “at no time after 1989 consented or permitted [his] use, occupation or possession of the Property.” Michelle’s affidavit asserted that plaintiff’s use and occupancy of the property was permissive. Defendants offered documentary evidence of both their and Michelle’s legal title to the property and counter-affidavits that characterized any use of the property by plaintiff as periodic and sporadic. Importantly, defendants produced the lien documents. Plaintiff’s affidavit did not address the lien documents directly.

Plaintiff’s claim that he adversely possessed the property from at least 1989 through 2004 is defeated by his admissions under oath in the construction liens he filed in April and September

2011. By definition, a construction lien results after a contractor, subcontractor, supplier, or laborer, provides an improvement to the real property of another. MCL 570.1103(3) and (5). MCL 570.1107(1) “of the Construction Lien Act states that a contractor who provides an improvement to real property has a construction lien on the interest of the owner who contracted for the improvement to the real property.” *CD Barnes Assoc, Inc v Star Heaven, LLC*, 300 Mich App 389, 418; 834 NW2d 878 (2013). The construction lien filed by plaintiff in April 2011 provided that plaintiff first began to improve the real property at 246 Webster Avenue on May 18, 1985, and last made improvements on April 2, 2011. Plaintiff identified himself as a contractor, subcontractor or supplier who provided improvements to real property owned by Michelle Ashen. As the lien claimant, plaintiff claimed he was owed over \$27,000 for his improvements to the real property. Plaintiff filed another lien later the same year in September on the 246 Webster Avenue property again indicating that the property was owned by Michelle and this time claiming \$24,900 for maintaining the property, buildings and landscape beginning July 17, 2007. The April 2011 lien, claiming a lien for improvements from 1985 through 2004, entirely swallows the 15-year statutory period and heavily weighs against the averments of plaintiff and his brother, Joe Ashen, that plaintiff’s use of the property from 1989 until 2004 was hostile. The lien demonstrates that plaintiff was not claiming title to the land during the statutory period and had permission to be on the land for the purposes of improving and maintaining it. Thus, plaintiff’s occupation was not hostile and not under a claim of right.

Plaintiff’s arguments to the trial court as to why it should have disregarded the liens were that the 15-year period may not have “tolled” at the time the lien claim was filed and there was no judicial adjudication of plaintiff’s ownership. Neither argument is persuasive. The lack of judicial adjudication certainly would have defeated an argument of judicial estoppel but that was not argued, nor was that theory a basis for the trial court’s decision. The court found that there was no material question of fact as to whether plaintiff made a clear claim of right or presented clear evidence of hostile possession of the property. We note that plaintiff does not contest the fact that he filed the liens. On appeal, he states the liens were filed to prevent an earlier sale of the property. At hearing for summary disposition, he only asserted the “tolling argument” and did not supplement his affidavit to address the lien documents. We assume that his tolling argument was that the 15-year period of continuous possession had not accrued by 2011. However, the 15-year period culminated in 2004 and both lien claims, filed seven years after 2004, claimed plaintiff was a contractor not owner of the subject property through to 2011.

The trial court did not err in concluding that when viewing the evidence in the light most favorable to plaintiff, plaintiff failed to establish a claim for adverse possession because his use during the 15-year statutory period was not hostile or under a claim of right.^{1,2}

¹ Plaintiff does not challenge the trial court’s trespass holding. In any event, because defendants have rightful title to the property in the wake of plaintiff’s failed claim of adverse possession, they would have the right to protect the property against trespass of others. *Beach*, 489 Mich at 127.

² Plaintiff also makes a cursory statement that the court’s order requiring him to remove his belongings from the property denied him due process, but he does not develop this argument.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Douglas B. Shapiro

/s/ Michael F. Gadola

Mitcham v Detroit, 355 Mich 182, 203; 94 NW2d 388 (1959) (“It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, . . .”).